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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LEIGHTON A. WEDERATH and **EDNA WEDERATH**, His Wife, Appellees, vs. **LARRY BRANT** and **ANITA BRANT**, His Wife, Appellants.	)	Filed September 20, 1979 156 2-62248

Appeal from Greene District Court - Leo F. Connolly, Judge.

Defendants appeal adverse judgment and damage award for their holding over on plaintiffs' land beyond lease-term. Plaintiffs cross appeal trial court's denial of double damages. - Affirmed.

David L. Phipps, of Whitfield, Musgrave, Selvy, Kelly & Eddy, Des Moines, and Robert L. Horak, of Reading, Pauley, Horak & Mumma, Jefferson, for Appellants.

David E. Green, Carroll, for Appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendants Larry and Anita Brant appeal judgment awarding plaintiffs Leighton and Edna Wederath damages for defendants' possession of land beyond a lease-term. Affirmed.

In 1975, the Wederaths filed a forcible entry and detainer action to regain possession of Greene County farmland they had leased to the Brants. The Brants claimed two years remained on a three-year lease but the trial court found the parties had a one-year lease and entered summary judgment for the Wederaths. The Brants appealed that summary judgment but the case did not reach the Supreme Court of Iowa until the claimed three-year lease period had expired. The supreme court, over the dissent of Justice Uhlenhopp, dismissed the appeal as moot.

This amended action for damages followed. The trial court ruled the prior summary judgment constituted the "law of the case" and thus, the one-year duration of the lease and the Wederaths' right to possession after that year were established as a matter of law. The trial court determined those issues were res judicata and the Brants now challenge that finding on several grounds. They raise other issues as well and the Wederaths cross appeal the lower court's damage award.

I. The Brants assert the prior litigation on the length of the lease-term and the Wederaths' right to possession did not preclude relitigation of those issues in this amended damages action. They claim the prior summary judgment was entered without subject matter jurisdiction and therefore susceptible to collateral attack. They assert the prior rulings of the trial and supreme courts are invalid and not binding on this litigation.

A. The Brants specially appeared in the 1975 forcible entry and detainer action. The Carroll County District Court sustained their special appearance and granted a change of venue to Greene County, situs of the real property involved. The Wederaths failed to proceed timely in Greene County as required by Iowa R. Civ. P. 175. However, they moved for and were granted summary judgment in Greene County. The Brants appealed the summary judgment but did not raise any jurisdictional challenge. The appeal was dismissed as moot by the supreme court. The Brants now collaterally attack the summary judgment on jurisdictional grounds.

Subject matter jurisdiction may be raised anytime. Recker v. Gustafson, 271 N.W.2d 738 (Iowa 1978). But as stated in Lincoln Joint Stockland Bank v. Brown, 224 Iowa 1256, 1260, 278 N.W. 294, 296 (1938):

> The decision on the prior appeal is conclusive on the second appeal as to the jurisdiction of the trial court, and as to that of the appellate court on the prior appeal. On the second appeal the decision of the appellate court, arising merely from its assuming jurisdiction of the appeal, is conclusive that the order appealed from, was appealable, and that the court had jurisdiction of the appeal; and, as has been said, to permit afterwards, * * * a suggestion of the want of jurisdiction in the appellate court upon the first appeal, as a sufficient cause for reexamining the judgment, would certainly be a novelty in practice.

See also Gallagher v. Clark, 5 F. Supp. 547 (D.C. Iowa 1934); Restatement (Second) of Judgments, Reporter Notes § 15d (Tent. Draft No. 5, 1978). Here, the court dismissed the Brants' appeal on mootness rather than subject matter jurisdiction grounds. We are bound by the supreme court's determination, albeit unexpressed, that subject matter jurisdiction was present in the earlier litigation. Since jurisdiction was present, the prior litigation established the law of the case on the lease-term and right of possession issues.

B. The Brants also collaterally attack the summary judgment considered in the previous appeal alleging it was entered when factual questions remained unresolved. In the prior appeal, the case was dismissed as moot. The mootness dismissal made the summary judgment stand as a verity, as if never appealed, and res judicata until set aside, modified or reversed. Peterson v. Eitzen, 175 N.W.2d 848, 851 (Iowa 1970). Collateral attack of a judgment may be made only on jurisdictional grounds. Fetters v. Degman, 250 N.W.2d 25 (Iowa 1977). Here, the jurisdictional attack has been disposed of under Brown and grounds for collateral attack thereby have been lost.

C. The Brants claim their due process rights have been violated because no hearing or trial took place on the lease-term and right of possession issues. Any alleged due process violation, however, likely resulted from the Brants' failure to seek a hearing at the time of the summary judgment proceeding. In its order setting the record on appeal of the summary judgment, the trial court specifically found "that at no time did this court ever refuse to have a hearing for the purpose of taking testimony and refuse to allow the offer of depositions into evidence and consider the same." That order also

stated the Brants' trial counsel "appeared in connection with the resistance to the motion for summary judgment . . . (and) never asked for any other hearing and specifically never was refused permission for the purpose of taking testimony. . . ." The Court allowed depositions to be included in the appeal record although "no depositions were offered at said hearing on behalf of the defendants-appellants into evidence for the court to consider." A litigant cannot complain of error he has invited. "Defendant cannot have the benefit of self-created error." Knudson v. Merle Hay Plaza, Inc., 160 N.W.2d 279, 285 (Iowa 1968). Here, any denial of an opportunity to be heard on the lease-term and right to possession issues is due to the Brants' failure to seek hearing on the summary judgment.

Furthermore, the Brants did not raise due process objections during the initial proceeding. Questions not presented to and not passed upon by the trial court cannot be raised or reviewed on appeal, even if they are constitutional questions. Foods, Inc. v. Leffler, 240 N.W.2d 914, 919 (Iowa 1976). This issue was not preserved for direct appeal, let alone this collateral attack. The trial court did not err by precluding litigation on those issues decided in the summary judgment.

II. Both parties appeal trial court's assessment of damages. The Brants allege the court improperly measured the damages and allowed the award to exceed actual losses and the amount of the supersedeas bonds. The Wederaths cross-appeal the court's refusal to award double-damages for what they assert was a willful holding over.

The trial court order stated damages were measured on "the reasonable rental value of the premises for the period which possession (was) withheld." As stated in Butterfield v. Kirtley, 115 Iowa 207, 209, 88 N.W. 371, 371 (1901), "There was no error in permitting plaintiff to prove the yearly rental value of the land, as that was a proper basis upon which to estimate damages for the period the land was detained, and also proper because farm lands such as these usually rent by the year." While the trial court might have allowed introduction of evidence on the lease rental amount to aid in finding the fair rental value, it properly ruled the lease rent was not dispositive on the amount of damages suffered. See Deneck v. Henry F. Miller & Son, 142 Iowa 486, 119 N.W. 380 (1909). We find the court applied the proper damages measurements and affirm its award.

We are aware the award exceeded the supersedeas bonds but do not find the bonds

established a maximum for damages. Iowa R. Civ. P. 337 states the appellant filing the bond agrees to pay the judgment if affirmed and "all rents of or damage to property during the pendency of the appeal, of which appellee is deprived by reason of the appeal." Here, the additional award was rent for the Brants' continued possession of the land during appeal.

The Wederaths challenge the trial court's award alleging the holding over was willful and therefore double damages should have been assessed under section 562.2, The Code 1977. The trial court's ruling the holding over was not willful finds support in the fact it was authorized by judicial stay orders. We find the trial court correctly denied the award of double damages since the Brants' retention of the land cannot be deemed in bad faith in light of the reasonable facts and circumstances. See Nelson v. Deering Implement Co., 241 Iowa 1248, 42 N.W.2d 522 (1950); 49 Am. Jur. 2d Landlord and Tenant § 1132 (1970).

III. The Brants assert the trial court erred by striking their demand for a jury trial. The Wederaths' claim for damages was filed as an amendment to the original action on June 20, 1977. The Brants' motion for a jury trial was filed September 23, 1977, clearly beyond the time prescribed in Iowa R. Civ. P. 177 for jury trial demands. The demand properly was striken.

We have reviewed all issues raised by the parties and find the trial court did not err.

AFFIRMED.

All judges concur, except Oxberger, C.J., who dissents.

OXBERGER, C.J. (dissenting)

I would reverse and allow litigation on issues surrounding the lease duration.

The preclusive effect given the previous summary judgment by the trial court and the majority here accomplishes that which the supreme court sought to avoid with its mootness dismissal. The supreme court said all issues in the case were "purely academic" and a decision on them would constitute "an interdicted advisory opinion." Yet, by giving the summary judgment preclusive effect, the supreme court mootness dismissal effectively decided the issues and is tantamount to the interdicted advisory opinion the court refused to make. Justice Uhlenhopp's dissent expressed justified concern that dismissal of the summary judgment appeal constituted a decision that the Brants had only a one year lease. He recognized the action, "the true duration of the lease — is still very much alive" yet the supreme court deemed it moot. In doing so, under the majority's holding, it also decided the issue of the lease duration.

I would permit the collateral attack on jurisdictional grounds. "A question of generic subject matter jurisdiction is of fundamental importance not just to the litigants but to the state and society in general." Vestal, Res Judicata/Preclusion V-266 (1969). Jurisdiction of the subject matter cannot be conferred by consent, estoppel or waiver. Qualley v. Chrysler Credit Corp., 261 N.W.2d 466 (Iowa 1978). Courts have the duty to raise jurisdictional questions sua sponte. In re Goar's Estate, 252 Iowa 108, 106 N.W.2d 93 (1960). Here, the jurisdiction question was ignored by the parties and the courts throughout the summary judgment proceeding and appeal. The majority finds the supreme court implicitly ruled it had jurisdiction but such a finding only compounds the error.

Clearly, the requirements of Iowa R. Civ. P. 175 were not met and the previous action was dismissed by operation of law. The summary judgment in that action was invalid and should be set aside. Interests of the parties and the public would be furthered by doing so. Here, the policy underlying the doctrine of res judicata is outweighed by the policy against permitting courts to act beyond their jurisdiction. The factors for allowing collateral attack of a judgment to avoid its preclusive effect, enunciated in Restatement of Judgments § 10 (1942) are present:

(a) the lack of the jurisdiction over the subject matter was clear,

(b) the determination as to jurisdiction depended on a question of law rather than

of fact, . . .

(d) the question of jurisdiction was not actually litigated,

(e) the policy against the court's acting beyond its jurisdiction is strong.

The fact the issues precluded by the previous judgment were established as res judicata by a mootness dismissal also supports the rationale for granting the reversal. See Restatement (Second) Judgments § 61.1, Comment (a) (Tent. Draft No. 4, 1977).

I dissent.